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ABSTRACT

Arguments on the application of the Alabama Educational Television Commission (AETC) for license renewal of eight educational television stations were heard before the Federal Communications Commission (FCC). Individuals from Black Efforts for Soul on Television and the National Association of Black Media Producers opposed the renewals, claiming that programing offered by AETC did not serve the needs of Alabama's minority population. The commission found the licensee had under-represented blacks at both production and planning levels, and excluded most black-oriented programing available from other sources. The AETC disclaimed responsibility for programing decisions of contract stations and maintained it had been unaware of discriminatory policies. The FCC held the AETC accountable, and though noting improvements since the end of the license term, denied renewal on the basis of performance during the term. The AETC was granted interim authority to continue station operation, until new applications could be processed. Dissenting opinions are included. (KC)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 74-1385
29210

In Re Applications of	
ALABAMA EDUCATIONAL TELEVISION COMMISSION	
For Renewal of Licenses for:	
Station WAIQ(ED-TV) Montgomery, Alabama	DOCKET NO. 19422 File No. BRET-69
Station WBIQ(ED-TV) Birmingham, Alabama	DOCKET NO. 19423 File No. BRET-5
Station WCIQ(ED-TV) Mt. Chesha State Park, Alabama	DOCKET NO. 19424 File No. BRET-7
Station WDIQ(ED-TV) Dozier, Alabama	DOCKET NO. 19425 File No. BRET-14
Station WEIQ(ED-TV) Mobile, Alabama	DOCKET NO. 19426 File No. BRET-87
Station WFIQ(ED-TV) Florence, Alabama	DOCKET NO. 19427 File No. BRET-130
Station WGIQ(ED-TV) Louisville, Alabama	DOCKET NO. 19428 File No. BRET-147
Station WHIQ(ED-TV) Huntsville, Alabama	DOCKET NO. 19429 File No. BRET-109
and	
For License to Cover Construction Permit for Station WIIQ(ED-TV), Demopolis, Alabama	DOCKET NO. 19430 File No. BLET-267

APPEARANCES

Marvin J. Diamond, Corwin R. Lockwood and Richard Rodin (Hogan & Hartson) on behalf of Alabama Educational Television Commission; Ellen S. Agress and Frank W. Lloyd (Stephen Suitts also appeared at the oral

argument) on behalf of Rev. Eugene Farrell, Linda Edwards, Stephen Suitts and William D. Wright; and Walter C. Miller and P. W. Valicenti on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: December 17, 1974 ; Released: January 8, 1975.

Commissioner Glen O. Robinson, for the Commission: Chairman Wiley not participating; Commissioners Lee and Reid dissenting and issuing statements.

Background

1. Before the Commission are applications of the Alabama Educational Television Commission (AETC) for renewal of licenses for the license term commencing April 1, 1970, for its eight educational television stations and for a license to cover the construction permit for a ninth station in Demopolis, Alabama.

2. The Alabama Educational Television Commission was set up by the Alabama State legislature in 1953 and is the licensee for all state-owned and operated noncommerical television stations. All programming is simulcast over the several stations; however, responsibility for the production and acquisition of programming is vested in a number of production centers which are autonomous as to programming but depend on the state either directly or indirectly for financing. The heads of the institutions with which the production centers are affiliated form a Program Board which coordinates the activities of production centers. The production centers have discretion to acquire programming through affiliation with the National Education Television network, purchase from other sources or production by themselves, and with the exception of the Montgomery Studio Center (which was the only production center completely funded by and under the direct control of AETC), their relationship with the AETC is purely contractual. Nevertheless, the ultimate control and responsibility for all program operations remains in the hands of the AETC which has the power to revoke all such delegations of its authority. The AET Commissioners are not active in programming decisions; that responsibility, through the implementation of the AETC Program Policy (see Initial Decision para. 5), has been delegated to the General Manager and his subordinate, the Program Coordinator, who coordinate and schedule the programs made available by the production centers. A considerable amount of the

AETC's programming is devoted to in-school instructional broadcasts. The AETC has chosen to delegate responsiblity for the content of this programming to the Alabama State Department of Education (SDE), although the actual production or acquisition of programming is performed by the production centers. The AETC retains only a limited role in the production of in-school programming, confined largely to scheduling and technical assistance. The Citizens Advisory Committee which was established by the AETC to keep it informed of the public's reaction to its programming and to suggest improvements, was inactive during the license period.

3. This proceeding grew out of informal complaints about racial discrimination in programming and employment practices during the preceding license term (1967-1970) filed by Reverend Father Eugene Farrell, S.S.J., Linda Edwards, and Steven Suitts. Initially, the Commission concluded that "there is no substantial problem warranting further inquiry," and renewed the licenses. (25 FCC 2d 342 (1970)). However, on petitions filed jointly by Edwards, Farrell and Suitts, and jointly by Anthony Brown and William D. Wright, 1/ the Commission reconsidered its order granting the renewals and designated the applications for a hearing on the following issues (33 FCC 2d at 513):

1. To determine whether the Alabama Educational Television Commission has followed a racially discriminatory policy in its overall programming practices.

2. To determine whether the Alabama Educational Television Commission has broadcast programming serving the needs of Alabama's citizens.

3. To determine the extent of efforts being undertaken by the Alabama Educational Television Commission to develop programming to serve the needs of Alabama's citizens.

1/ The petition of Anthony Brown, filed both individually and as representative for the National Association of Black Media Producers, and William Wright, individually and as representative for Black Efforts for Soul in Television, was dismissed in the designation order because no pre-grant complaint had been filed and good cause had not been shown for the failure to participate in the earlier stages of the proceeding. However, subsequently, on April 24, 1972, the ALJ authorized the intervention of William D. Wright as representative for Black Efforts for Soul in Television (FCC 72M-527). Wright has joined with Edwards, Farrell and Suitts in filing exceptions to the Initial Decision.

4. To determine whether the Alabama Educational Television Commission has made reasonable and good faith efforts to assure equal opportunities in its employment policies and practices in accordance with Section 73.680 of the Commission's Rules.

5. To determine whether, in light of the evidence adduced pursuant to the foregoing issues, a grant of the Alabama Educational Television Commission's above-captioned applications would serve the public interest, convenience and necessity.

4. In an Initial Decision (I.D.) released August 22, 1973, Administrative Law Judge (ALJ) Chester F. Naumowicz, Jr., recommended renewal of the licenses and grant of the license to cover the construction permit. Except as modified in this Decision and in our rulings on exceptions contained in the Appendix, the findings of the ALJ are affirmed. However, after a careful review of the hearing record, the exceptions to the Initial Decision, the supporting and opposing briefs thereto, and having heard oral argument, we draw different inferences from his findings, on the strength of which we conclude that the subject applications must be denied.

The Issues

5. At the outset, it is necessary to correct certain erroneous assumptions made by the ALJ which we believe seriously misconceive the law and the policy regarding the burden of proof in license renewal and the law and policy in regard to licensee responsibilities.

6. First, the ALJ appears to have misconceived AETC's obligations as a renewal applicant in this proceeding. In commenting upon several disputed factual issues, the ALJ evidently assumed that the burden was upon petitioners to establish that adverse findings were warranted. 2/ However, Section 309(e) of the Communications Act imposes upon the

2/ For example, the ALJ stated at paragraph 14 that "there is no indication in the record" that AETC has ever had a formal policy of discrimination; that "the record is inadequate to support" a finding that AETC applied an inconsistent policy in pre-empting black oriented programming (para. 22); and "nor does the record indicate" that racial considerations affected AETC's programming decisions (para. 47).

renewal applicant the burden of showing that renewal is in the public interest. AETC as renewal applicant was obliged to show affirmatively with respect to each designated issue that renewal of its license would serve the public interest. *Milton Broadcasting Company*, 34 FCC 2d 1036 (1972). *Office of Communication of the United Church of Christ v. FCC*, 425 F. 2d 543 (D.C. Cir.1969). AETC's obligation in this connection was underscored by our designation order, which specifically placed both the burden of coming forward with evidence as well as the ultimate burden of proof (or risk of non-persuasion) upon AETC. 33 FCC 2d at 514.

7. Second, we conclude the ALJ erred in giving decisional weight to his finding that "neither the State of Alabama nor the AETC has any direct control over the programming they acquire or produce, or any authority to regulate the policies under which they operate" (I.D. para. 6); and that the "production or acquisition of programming has been placed in the hands of entities over which the AETC has little legal control" (I.D. para. 13). Assuming that these statements are factually correct--and petitioners contend that they are not--they are immaterial. As a matter of law and public policy, AETC has ultimate responsibility for any inadequacies in station operations during its license term regardless of the reasonableness of its delegation of programming responsibility to outside agencies. As we have repeatedly emphasized, a licensee cannot escape responsibility for the actions of those to whom it delegates programming responsibilities simply because it was unaware of such actions or was misled by an employee. 3/ Thus, in *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968), *petition for reconsideration denied*, 17 FCC 2d 485 (1969), we held that a station manager's gross misconduct and fraud on the Commission must be imputed to the licensee who had failed to exercise adequate control and supervision over the management and operation of its station consistent with its responsibilities as a licensee, and in *Gaffney Broadcasting, Inc.*, 23 FCC 2d 912, 913, (197), we stated, "licensees are responsible for the selection and presentation of program material over their stations, including advertising matter, as well as acts of omission of their employees." A licensee is similarly responsible for the content of the programming

3/ We accept that, in principle, there may be instances of "frolic and detour" beyond the scope of reasonably forseeable employee activity, where the licensee, although formally responsible for an employee's misconduct, could escape official sanction or severe censure by showing that its supervision was reasonably diligent, in all the circumstances of the case. Such a defense is clearly inapplicable, however, where, as here, a protracted course of licensee conduct suggests that as a practical matter, it has exercised virtually no independent judgment with respect to programming to meet tne needs and interests of its community of license.

it broadcasts and cannot avoid its duties as a licensee by averring unfamiliarity with the programs it has broadcast on its designated frequencies. *License Responsibility to Review Records Before Their Broadcast*, 28 FCC 2d 409 (1971), *clarified*, 31 FCC 2d 377 (1971), *aff'd sub nom. Yale Broadcasting Co. v. FCC*, 478 F. 2d 954 (D.C. Cir. 1973), *cert. den.* 94 S. Ct. 211 (1973); *TransAmerica Broadcasting Corp.*, 20 FCC 2d 469 (1969). We emphasized this fundamental principle of licensee responsibility at an earlier phase of this case in refusing to designate certain additional issues concerning AETC's programming operations and alleged violations of the terms of its broadcast authorizations and of Section 310(b) of the Communications Act:

> The AETC, of course, in carrying out its functions as a licensee, may delegate certain responsibilities just as any other broadcaster or corporate entity. However, the AETC, as licensee, also has ultimate control over every aspect of its broadcast operations; consequently, although the AETC may have delegated certain program functions to its Program Board or program production centers, these facts do not alter the rights vested in the AETC to revoke such delegations and to exercise full responsibility over its programming operations. 33 FCC 2d at 508.

Therefore, AETC cannot be excused for any deficiencies or improprieties in programming policies or practices merely because it delegated certain aspects of its programming to other entities.

Discriminatory Programming

8. The ALJ found that during the license period in question AETC "displayed a pattern of minimal integrated programming" 4/ at the beginning of the period but that it was substantially increased toward the end. (I.D. para. 17). He also found that the paucity of black-oriented programming could not be attributed to nonavailability since NET offered a substantial amount of such programming, but that "AETC elected to broadcast virtually none of these programs" (I.D. para. 19). In a state whose black population is approximately 30 percent, this obviously presents an issue of grave importance. The ALJ did not give it sufficient weight.

4/ "Integrated programming" included all programs in which at least one black person appeared on the air.

The ALJ concluded that this dearth of black-oriented programming resulted from AETC's desire to provide programming of value to everyone which "blinded it to the possibility that some of its viewers might have special needs" rather than from a design to discriminate on the basis of race, and he resolved the issue favorably to AETC. This conclusion was reached, in our view, because of the ALJ's misapplication of the burden of proof, the undue weight which he accorded the broadcast of some integrated programs, and his unwarranted emphasis on the lack of evidence of a "formal" policy of racial discrimination or of instructions that racial discrimination should be practiced. (I.D. paras. 14, 16, 46). As we have already emphasized, the burden of proof is on the renewal applicant to show that a grant is in the public interest. With respect to the significance of the evidence concerning integrated programming and the need for proof of a formal policy of discrimination, we have carefully considered AETC's contentions in support of the ALJ's findings, but we find them to be without merit. While it is true that there is no evidence that *direct orders* were ever issued to discriminate on the basis of race, the absence of such evidence is hardly dispositive. A policy of discrimination may be inferred from conduct and practices which display a pattern of underrepresentation or exclusion of minorities from a broadcast licensee's overall programming. *Radio Station WSNT, Inc.*, 27 FCC 2d 993 (1971). 5/ In light of the facts of record set forth below, we find a compelling inference that AETC followed a racially discriminatory policy in its overall programming practices during the license period.

9. At the hearing, counsel for AETC and petitioners stipulated into evidence information concerning the extent to which each program was integrated (i.e., at least one black person appeared on the program), as well as information concerning the production center, title, duration, and other details of programs telecast in each of five

5/ Under this so-called "rule of exclusion," circumstantial evidence of racial discrimination--such as substantial underrepresentation of a discriminated class--rather than direct or explicit proof of discriminating acts has long been recognized as sufficient to establish a *prima facie* case. *Norris v. Alabama*, 294 U.S. 587 (1935); *Alabama v. U.S.*, 304 F. 2d 583 (5th Cir. 1962) *aff'd per curiam*, 371 U.S. 37 (1962). If it were otherwise, even quite aggravated instances of racial discrimination would often have to go without redress. Of course, we do not mean to imply that circumstantial evidence equally capable of innocent or guilty explanation will necessarily be given its most damning interpretation. But where, as here, other evidence tends to confirm the suspicion of race prejudice, we will not strain to blink away the implication. Indeed, given the fact that AETC has the burden of proof on this issue, we do not see how we could do otherwise.

weeks during the license period. Petitioners assert, and we agree, that the appearance of a black person on a program does not necessarily mean that the program is "integrated" in any meaningful sense or that integrated programming is the sole test of discrimination. Nevertheless, the evidence is useful as one indication of the effect of AETC's programming policies. As we stated in *Citizens Communications Center* (25 FCC 2d 705, 707, (1970)):

> Although the licensee has great discretion, that discretion is, of course, limited by the necessity to act under policies consistent with the public interest. Thus, a serious question would be presented if in its overall programming a licensee ignored the needs of his community, or, for example, arbitrarily refused to present members of an ethnic group, or their views. Refusal to present members of such a group, either as such or in integrated situations with members of other groups, would constitute discrimination in programming.

10. The stipulated five sample weeks disclose the following proportions of integrated programming:

Week	Percentage
October 1 to 7, 1967	.7%
June 30 to July 6, 1968	1.5%
November 10 to 16, 1968	.7%
December 14 to 20, 1969	8.2%
January 4 to 10, 1970	12.7%

The sample weeks clearly demonstrate a pattern of negligible integrated programming during the first two years of the license term. Furthermore, although the percentage of integrated programming increased during the final year, this increase was due almost entirely to the frequent broadcast of "Sesame Street", a non-locally produced program for pre-school children. Five of the six integrated hours during the December 1969 sample week, and nine of the nine and one-half hours of integrated programming during the January 1970 sample week consisted of "Sesame

Street." 6/ Furthermore, there is no evidence of record that the in-school instructional programming which was locally produced contained any significant amount of integrated programming. Inferences of discriminatory practices may justifiably be drawn from the lack of integrated programming; a heavy burden was accordingly placed on AETC to overcome this adverse evidence. *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994, 1007-08 (1966). Not only did if fail to bear this burden, but, on the contrary, evidence adduced by petitioners lends further support to the view that the deficiencies in AETC's programming were not the product of inadvertence alone.

6/ "Sesame Street" is integrated--it uses both black and white actors--and it is designed especially to meet the needs of culturally disadvantaged pre-school children, a class which we may assume to include a large number of the state's black children. But, standing by itself, "Sesame Street" can hardly bear the weight that AETC would put upon it. Pre-school children are only a small part of the black--or white--population. The needs and interests of this small group almost surely does not coincide with those of older black residents of the state, whose numbers--and whose history--entitle them to special consideration, and whose neglect gives rise to special suspicions. Although the AETC has introduced evidence detailing additional integrated programming broadcast during the license term (AETC Exhibit 1; see also I.D. at para. 16), we note that counsel for AETC has stipulated that the weeks were chosen to provide a "random view of what /AETC's/ typical weekly programming is." While we have considered all evidence of AETC's programming contained in the record, we believe that the sample weeks provide the most reliable indicator of the extent to which AETC has actually broadcast integrated programming. In any event, this additional integrated programming--which AETC acknowledges includes all the further integrated programs revealed in its records--amounts to only 46 hours and 45 minutes of programming, or some .5% of the over 10,000 hours of programming broadcast during the license term. Furthermore, nothing in the record shows that the sample weeks are unrepresentative or unreliable evidence of typical AETC programming at different times during the license term.

11. It is not surprising that the percentage of integrated programming during the license period was minimal, given the membership of the various boards and committees which were responsible for the production and broadcast of programs on Alabama's network of educational television stations. There were no black AET Commissioners, no black AETC professional staff, and no blacks on the Program Board during the license period. The production centers were all located at predominantly white institutions and the record establishes that there was no significant black involvement in the preparation of programming at those production centers. Likewise there were no blacks on the Curriculum Committee, an organization created by SDE for the purpose of planning and coordinating instructional programming; and, as the ALJ found (I.D. para. 18), no integrated in-school programming was produced locally. The record indicates that neither the Curriculum Committee nor AETC, which was represented on that Committee, made any serious efforts to consult with blacks in the planning or production of such programs or to obtain the participation by blacks in their presentation on the air. Dr. Frankie Ellis, a black woman who has chaired the Department of Teaching Disciplines at Tuskegee Institute since 1966, testified that she knew of no black teacher who had been invited to appear as an instructor on the AETC network, and that no black members of the faculty at Tuskegee Institute have been solicited by the SDE to help prepare curricula for in-school instructional programming. This evidence was uncontradicted by AETC.

12. AETC's failure to take affirmative steps to prevent the exclusion of blacks from participation in its instructional programming becomes particularly significant in view of the considerable controversy and numerous Federal court opinions concerning discriminatory practices in the Alabama state educational system prior to and during the license term. 7/ Since AETC had turned over responsibility for a considerable portion of its educational programming to the State Department of Education (SDE), it was incumbent on the licensee to take adequate precautions against the possibility that discrimination would take place in that sector of its programming. Yet Raymond Hurlbert, general manager of AETC, testified that he was only "vaguely aware" of the racial desegregation controversy in the Alabama school system during the license period, and that the AETC took no steps to investigate the

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7/ The following cases discuss the situation which existed in Alabama in considerable detail:

Lee v. Macon County Board of Education, 267 F. Supp. 458, *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

Lee v. Macon County Board of Education, 283 F. Supp. 194 (1968).

Lee v. Macon County Board of Education, 317 F. Supp. 103 (1970).

legal controversies surrounding the SDE. We think it is literally incredible that a man in Mr. Hurlbert's position would be unaware of the situation which prevailed in the administration of the Alabama school system during this period. The common sense of experience compels the conclusion that AETC's failure to insist upon the participation by blacks in the planning, production, and broadcast of instructional programs was due to its agreement with, and its acceptance of, SDE's exclusionary policies and practices. 8/

13. Of course, petitioners' showing could have been rebutted by a satisfactory explanation for the lack of black involvement at AETC. Evidence of efforts to recruit black participants and of the nonavailability of qualified blacks are well-recognized defenses to a *prima facie* case established under the rule of exclusion. *Norris v. Alabama*, 294 U.S. 594; *Brooks v. Beto*, 366 F. 2d 1 (5th Cir. 1966). Yet, despite the fact that under our designation order it had the burden of proceeding and of proof on this issue, AETC offered only the statements of its general manager disclaiming any intention to discriminate and denying ever ordering his subordinates to so discriminate. Under well-established precedent in racial discrimination cases, the charge of racially discriminatory programming practices supported by reliable evidence of exclusion which amounts to a *prima facie* case of discrimination cannot be rebutted with such unadorned denials. *See Brooks v. Beto*, 366 F. 2d 1, 10 (5th Cir. 1966); *Smith v. Texas*, 311 U.S. 128, 1321 (1940); and *Norris v. Alabama, supra.*

14. Finally, it is clear that the AETC took steps which effectively precluded the broadcast of virtually all black-oriented network programming that was made available to it by the National Educational Network (NET) during the license term. While rejecting some network programs for the valid reason that they contained obscene or vulgar matter, AETC took an unusually harsh attitude in the application of its obscenity standard where black programming was concerned. Thus, a segment of the

8/ If, in fact, AETC (through its general manager) were unaware of the school situation in this period, it would reflect adversely on its qualifications to continue as a Commission licensee. The charges of discrimination against blacks in the Alabama school system received not only local but nationwide attention. It is difficult to see how a licensee could claim not to be at least generally aware of such difficulties with the SDE without thereby confessing itself to be manifestly inept. Ineptness does not excuse a broadcast licensee's failure to meet its obligations to the public interest. *See The Court House Broadcasting Co.*, 21 FCC 2d 792 (1970).

series, "Black Journal," was deleted ostensibly because it contained "obscene" material. Nevertheless, another program not of special interest to blacks, "The Battle of Culloden" was broadcast even though it contained language of comparable coarseness. 9/ The next segment of this series was deleted because of its "limited value," and while the record does not disclose whether subsequent segments were previewed, none was thereafter broadcast during the remainder of the license term. In this connection, however, it is pertinent to note that the segment offered by NET on February 23, 1970, during the license term, was not broadcast until September 7, 1970, approximately five weeks after the filing of petitions for reconsideration of the Commission's order granting AETC's renewal applications. Another series, "The Show", was preempted after only one segment because of a notice of profanity in upcoming segments. In neither case was any attempt made to secure permission from the NET to exercise AETC's contractual right to "blip" out offending matter. 10/

9/ In "Black Journal" the words and phrases which were considered as precluding its broadcast were the following:

> "Damn;"
> "Go to hell;"
> "rats leaving crap in the corner;"
> "Nixon is trying to strangle the second reconstruction;"
> "Malcom X was a dissenter and they (the Establishment) killed him."

"The Battle of Culloden," an English historical drama, used the word "bastard" twice, and "friggin" once, and Mr. Hurlbert conceded at the hearing that he considered such language obscene.

10/ AETC asserts that Mr. Hurlbert misunderstood the language of the NET affiliation agreement under which a station could request prior permission from NET to edit out offending words or segments of programs without rejecting the entire show. Nevertheless, AETC conceded that the contract clearly empowers the station to secure permission to edit programs:

> "All N.E.T. programs will be broadcast by Station in full without any deletions or other changes, and station will not omit or replace any portion or segment thereof without prior consent from N.E.T."

15. Other policies and unexplained decisions similarly worked to keep virtually all black-oriented programs off the AETC network. 11/ Thus, the record is silent as to the explanation for AETC's decision not to carry the NET special on a Denver Black Panther trial. The series "On Being Black" was not broadcast and the explanation offered by Mr. Hurlbert for not doing so is clearly unsatisfactory. In a letter to the Commission dated February 23, 1970, Mr. Hurlbert advanced as a reason for its deletion that obscene matter was included in a segment offered for October 8, 1969. However, the decision not to broadcast the series was made some time prior to September 22, 1969, and the office memorandum which reflected the decision stated that it would therefore "be unnecessary for us to preview the feed regularly scheduled for Wednesday mornings, 10:00-11:00 a.m., effective September 24." Consequently, it appears that the programs were not reviewed before the decision to delete the series was made; and, in any event, no explanation was made as to why the September 24 and all other segments, excepting the October 8 one, were not carried. The "Soul!" series was not broadcast because of a conflict with another NET series, "Firing Line," but no effort was made to reschedule the programs for another time. On the basis of the foregoing, the ALJ's conclusion that network programming was not rejected on the basis of racial considerations cannot stand. Any one of these decisions, taken by itself, might reasonably be regarded as a valid exercise of a licensee's discretion as to scheduling or program content.

11/ The program coordinator decided whether a particular NET offering would be aired and his decision was approved explicitly or implicitly by the general manager. None of the persons who served as program coordinator during the license term was called to testify and Mr. Hurlbert had only a limited recollection of the specifics surrounding the decisions to preempt NET programs. However, several memoranda were placed in evidence which provide the only indication of the basis for the program coordinator's decisions.

But taken together, and unmitigated by an innocent explanation, these preemption decisions point irresistably toward a conclusion of racial discrimination. And this conclusion is fortified by the obvious lameness of AETC's "obscenity" rationale and the other related arguments advanced in support of its decisions concerning network programming.

16. The systematic exclusion of blacks and of programming designed to serve their distinctive interests is thus demonstrated by the substantial evidence adduced by petitioners that blacks rarely appeared on AETC programs; that no black instructors were employed in connection with locally-produced in-school programs; and that unexplained decisions or inconsistently applied policies forced the preemption of almost all black-oriented network programming. In addition to the paucity of integrated programming, the record indicates that there was virtually no black input into the programming process and no attempt during the license term by AETC to solicit black input through any of its decision making bodies. These factors, together with direct actions undertaken by AETC's management in rejecting almost all black-oriented NET programming, bear witness to and illustrate the policies that tainted the licensee's overall performance during the license period. Although AETC cites its listing of integrated programming aimed at black interests as affirmative evidence of nondiscriminatory policies, we hold that it is insufficient to refute petitioners' *prima facie* case. The stipulated sample weeks, which indicated little integrated programming, furnished, in our opinion, the most reliable evidence of the extent to which a typical week of AETC's programming was integrated. To the extent that scattered instances of other integrated programs were offered into evidence, they were too few in number to be outcome-determinative. Furthermore, evidence of merely *token* participation by members of the unjustly excluded class will not defeat a *prima facie* case of discrimination based on systematic exclusion. *Thiel v. Southern Pacific Company*, 328 U. S. 217 (1946). The limited examples of black involvement in AETC's programming we regard as amounting to no more than isolated participation; they are not sufficient to overcome the taint of discrimination which the record indicates belongs to AETC's overall programming practices.

17. In sum, the serious underrepresentation of blacks both on the air and at the production and planning levels, together with the overt actions of the licensee in rejecting most of the black-oriented programming available to it, constitutes persuasive evidence that racially discriminatory policies permeated AETC's programming practices. Accordingly, we conclude that AETC has failed to carry its burden of proving nondiscrimination. This resolution of the issue must be accorded substantial weight in determining whether renewal would serve the public interest.

Programming to Meet the Needs of the Citizens of Alabama

18. In considering whether AETC's programming served the needs and interests of its service area during the license term, the ALJ found that neither AETC nor its production centers made any affirmative effort to include blacks in the program selection process; that AETC was unaware of the unique needs of its black viewers for specialized educational programming; and that little programming to meet these needs was broadcast (I.D. paras. 24, 25, 49-52). 12/ He therefore resolved the issue against AETC. However, he also held that AETC's programming failures resulted, at least in part, from its reliance "upon a variety of reputable educational institutions" and that such failures were "the product of ignorance rather than malice"; and he found these factors mitigated the weight to be accorded to this adverse conclusion. We agree with the ALJ's conclusion that AETC failed to sustain its burden on this issue; we differ from him only in attaching greater significance to its failure to do so.

19. Because AETC's reliance on the SDE and the production centers cannot excuse its failure to meet its obligations as a broadcast licensee, our primary concern must be, not whether AETC was justified in placing so much reliance on the production centers, but whether its needs ascertainment was sufficient and its programming responsive. The preponderance of the evidence adduced by petitioners establishes that

12/ We must reject AETC's contention that the ALJ erred in his treatment of this issue by focusing attention on whether the licensee failed to serve the needs of blacks, rather than whether AETC's overall performance served the needs and interests of all of Alabama's citizens, black and white. Of course, AETC's overall performance must be considered, but it blinks reality to suppose that all the important needs and interests of Alabamians, whether black or white, coincide. The sufficiency of a licensee's service to a distinctive minority which constitutes approximately one-third of the whole population of the community must obviously be taken into account in evaluating the licensee's "overall" performance.

it was not. Petitioners' expert witnesses testified that the educational needs of black students are unique and not served by all educational programming even if that programming is of a very high caliber. 13/ In particular, petitioners have demonstrated that cultural and economic differences between the black and white population 14/ in Alabama have created

13/ Dr. Ellis testified that innumerable studies have pointed up broad discreparcies between Alabama's black and white communities in educational achievement due to past histories of racial segregation and economic deprivation. She emphasized that in order effectively to serve the needs of black students in Alabama, educational television must offer programming aimed at compensating for the educational lag of black students. Particularly, she noted that black children have special needs for black characters and teachers to emulate and identify with in order to help them develop positive attitudes toward learning and toward themselves. Likewise, Dr. Edgar Epps, a professor of urban education at the University of Chicago, testified that black Alabamians have developed cultural patterns and have educational needs that differ substantially from those of whites. Dr. Epps stated that the:

> . . .systematic exclusion of materials on black experience from school curricula and from media of communications can have a negative impact on the self-image of black children and adults which may lead to lowered aspirations and a lessening of motivation to strive for success in school and in later life.

14/ For example, while 15.7% of Alabama's white population were below the poverty line in 1969, 52.9% of the black population were below that level. Among Alabama's white population, 47.7% had completed four years of high school as of 1970, compared to 21.6% of the black population.

special needs that could not be served by AETC's avowed programming policy which considered race to be an irrelevant factor in designing its offerings. To this end, Mr. Ulysses Byas, the Superintendent of the Macon County Alabama Board of Education, testified that it was his experience that the majority of black students in Alabama enter school less well-prepared than white students to perform successfully in the classroom and that, in order to be effective, an educational system must act to deal with these different levels of preparation. Petitioners have thus convincingly shown the need of Alabama's black population for effective educational programming through "compensatory programming, programming to which blacks can relate and programming relating to black history and culture," and have demonstrated that integrated programming can be but one factor in meeting these needs. 15/

20. The record also indicates that AETC failed properly to police its programming decisions in order to ensure that they were responsive to black community needs. Specifically, AETC failed to evaluate the in-school programming produced by the State Department of Education and provided no specific guidelines for program selection by the production centers. AETC has not rebutted petitioner's evidence and, in fact, acknowledges that during the license term, it was unaware of the needs of blacks and that it failed to consider those needs. In the context of this proceeding, AETC's conceded ignorance of the needs of the substantial black population in Alabama, which it advances as the cause for the neglect of this minority group, cannot be accepted in mitigation of its culpability. We think AETC's professed ignorance of the programming needs of Alabama's black citizens is related to its custom, previously outlined, of excluding blacks from the planning and production of the programs broadcast over its network. It would outrage both public policy and common sense to allow this deliberate course of racial discrimination as a defense against some of its likely consequences. 16/

15/ While petitioners' evidence focused primarily on the deficiencies of AETC's service to black students via in-school instructional programming, we note that AETC devoted a considerable portion of its programming to such broadcasting. 33 FCC 2d at 50. Further, AETC has offered nothing to show how its other programming was aimed at serving black adults, and has failed to account for its decision to preempt virtually all network programming that was designed for black adults.

16/ Robert Dod, director during the license period of the Montgomery Studio Center, the production center funded by and under the direct control of AETC, testified that he knew of no black instructors appearing on the in-school instructional programming. The testimony of the general manager, Mr. Hurlbert was to the effect that, although AETC was unaware of the unique needs of black citizens, it tried to serve all the State's citizens by its educational programming and believed that it was serving black needs through quality educational programming.

[illegible] Furthermore, the Commission has consistently held that the failure to ascertain and serve the special needs and interests of sizable minority groups in its service area is, in itself, a failure of licensee responsibility irrespective of any intent to discriminate. [illegible] 38 FCC 1135 (1966); *Chapter Radio and Television, Inc., et al.*, 21 RR 2d 282 (1970). A licensee's failure to ascertain and serve the needs and interests of some 20 percent of its community's residents is fundamentally irreconcilable with the obligations which the Communications Act places upon those who receive authorizations to use the airwaves. *[illegible] Communications v. United States and Office of Communication of the United Church of Christ v. FCC*, 425 F. 2d 543 (D.C. Cir. 1969), aff'd sub nom. *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1969). Although ALTC as a noncommercial broadcaster was seeking to provide a particularized service to the citizens of Alabama--viz., educational programming--its responsibilities to minorities within its service area are no less important than those of commercial broadcasters. 17/ Both types of stations do, of course, use a valuable public resource, for which privilege they are rightly expected to serve the needs of the public. This obligation includes not merely service to the general public but also service to significant distinctive minority interests which are not and cannot be as fully served by commercial stations. We recognize, of course, that the Commission's present regulations do not require noncommercial educational stations to pursue formal ascertainment procedures to ascertain community needs. 18/ Nevertheless, the Commission has indicated that educational stations are not thereby relieved of the obligation to become aware of community needs and to program to meet such needs. Based on the history of legislative expressions of intent and the Commission's own prior statements concerning educational television, we have held that noncommercial

17/ Indeed an argument can be made that the educational broadcaster has a very special obligation to serve needs over and above what is expected of commercial stations inasmuch as the educational broadcaster not only receives the benefits of the public spectrum but also is supported by general public funds, the rationale for which is providing special services to the community. We do not put this forward as a special ground for decision here but only as a point that corroborates our finding that the licensee has not lived up to even minimal licensee standards.

18/ A rulemaking proceeding (Docket No. 19816) is currently pending to consider establishment of formal ascertainment requirements for educational broadcasters similar to those required for commercial broadcasters. *Ascertainment of Community Problems by Educational Broadcast Applicants*, 42 FCC 2d 690 (1973).

broadcasters have an affirmative duty to determine the needs and interests of their communities and to program in such a way as to meet those ascertained needs." *Citizens Committee to Preserve the Voice of Educational Broadcast Applicants*, 49 FCC 2d 990, 993. Indeed, we have noted that the strength of educational television derives "from its ability to be innovative and to serve significant minority tastes, needs and interests." *Ibid.* Because of the importance of the service which it renders -- whether it broadcasts instructional programming or, as is becoming increasingly the case, public programming -- educational television has a paramount obligation to endeavor to serve significant minority needs in its service areas. Therefore, despite the absence of an affirmative requirement to ascertain community needs, the ALJ's finding that AETC was unaware of the unique needs of its black viewers must reflect adversely upon AETC even if such unawareness was due only to negligence or ignorance.

22. We do not hold that the needs of a minority group may only be satisfied by programs designed specially for that group. Programs having a wider range of appeal may well suffice to satisfy the licensee's obligation of service to demographic minorities in its community of license. But at the same time we cannot accept that appeal to the general average of tastes, interests, problems, needs and interests is the one and only way for programming decisions to be made. A licensee cannot with impunity ignore the problems of significant minorities in its service area. As we made clear in *Time-Life Broadcast, Inc.*, 33 FCC 2d 1081, 1093 (1972), "[t]he problems of minorities must be taken into consideration by broadcasters in planning their program schedules to meet the needs and interests of the communities they are licensed to serve." The cases upon which AETC relies as supporting the sufficiency of its programming are distinguishable since none of them presented a situation where the licensee did not undertake in some reasonable manner to serve the needs of minorities in its service area. Thus, in *WKKW Broadcasting Corp.*, 30 FCC 2d 958 at 970 (1971), for example, we specifically noted that the licensee had made "reasonable efforts" to broadcast programs of particular interest to minorities, and that programs of particular interest to minorities had been carried periodically. Likewise in *Mahoning Valley Broadcasting Corporation*, 39 FCC 2d 52, 58 (1972), the Commission noted that the test was whether the licensee had made a reasonable effort to deal with the problems of its service area and,

on the basis of the information submitted, the Commission found that the licensee had done so. In the instant case, however, we have found that AETC excluded blacks from the decision-making process, that it did not take the trouble to inform itself of the needs and interests of a minority group consisting of 30 percent of the population of the State of Alabama, and that, as a result, it virtually ignored the programming needs and interests of that minority group. A finding that it made reasonable efforts to ascertain and to deal with the problems of the black minority in Alabama cannot reasonably be made. We find that AETC failed to sustain its burden of showing that it served the needs of all of Alabama's citizens.

Employment Discrimination

23. Section 73.680 of the Commission's Rules declares as a general policy that equal opportunity in employment "be afforded by all licensees or permittees of commercially or noncommercially operated" broadcast facilities to all qualified persons, and that no person be discriminated against in employment by reason of race, color, religion, national origin or sex. As the ALJ noted, this Rule, adopted on June 4, 1969, did not go into effect until July 14, 1969,19/ only about eight months before the expiration of the license term here in question. Nevertheless, broadcast licensees were expected to comply with the equal opportunity laws in effect prior to the promulgation of the Rule. 20/ Therefore, in the resolution of the issue (Issue 4) as to whether AETC made "reasonable and good faith efforts" to assure equal employment opportunities to employees and prospective employees, we have taken into account its overall performance in this respect. But in considering this issue we have taken into account AETC's efforts to comply with our Section 73.680 rules at all times, including after the expiration of the license term.

19/ *Report and Order, Nondiscrimination Employment Practices of Broadcast Licensees,* 8 FCC 2d 240 (1969).

20/ *See Nondiscrimination Employment Practices of Broadcast Licensees,* 13 FCC 2d 766 at 769 (1968), in which we stated that a violation of Title VII of the Civil Rights Act of 1964, 42 USC 2000(e) *et seq.*, "clearly raises a question as to the applicant's qualifications to be a broadcast licensee."

24. The record is ambiguous as to AETC's employment policies and practices during the license term. However, it does appear that three blacks applied for employment during that period and two were hired, one as a production assistant (part time) and one as a janitor. Moreover, there is no evidence of record of any instance where a black was denied employment on the basis of race. 21/ Petitioners argue that the employment of one full-time black out of a total staff ranging from approximately 30 to 50 employees makes out a *prima facie* case of discriminatory employment practices. But sole reliance upon statistical data is not warranted where, as here, only a small staff was employed by AETC and the record is devoid of proof of any affirmative acts of discrimination in employment. 22/

25. Furthermore, in view of the evidence that AETC did employ blacks during the license period, the fact that Section 73.680 was adopted such a short time before the expiration of the license term and the absence of any evidence suggesting that AETC denied employment to an individual by reason of race or color, we are justified in examining AETC's post-term employment policies and practices to help us determine whether the licensee behaved reasonably and in good faith in its efforts to assure equal employment opportunities for existing and prospective employees. As the record shows, and the ALJ found, AETC has made substantial efforts along these lines. AETC has initiated a number of measures aimed at recruiting minority applicants through various educational institutions, the Alabama NAACP, and the NET's training program for minorities. It has hired seven black employees, five of whom were in positions of responsibility at the network (three engineers,

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21/ See *Time-Life Broadcasting, Inc.*, 33 FCC 2d 1050, 1059 (1972), in which we stated that "the best evidence of such discrimination or noncompliance would be specific examples of persons who were discriminated against by the licensee because of race, religion, color, national origin or sex."

22/ *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d at 771; *Star Broadcasting Co.*, 41 FCC 2d 792, 815 (1973). See also *Jones v. Lee Way Motor Freight, Inc.*, 431 F. 2d 245 at 247 (10th Cir. 1970), where the Court stated, "In light of the large number /500/ of line drivers, the statistics established a *prima facie* case..."

an assistant to the director of programming, and a traffic manager). In addition, AETC has begun a training program in conjunction with the Jefferson County Committee for Economic Development and has established an equal employment opportunity program at the station. Other changes in its hiring procedures have also been made in order to exclude the possibility of employment discrimination. AETC's improvements have been ambitious enough, we think, to erase whatever questions may have been raised about its employment practices based on its license term performance. We agree with the ALJ that AETC has met its burden of proof on Issue 4.

Post-Term Upgrading

26. In our designation order, we directed that "the extent of efforts being undertaken by the Alabama Educational Television Commission to develop programming to serve the needs of Alabama's citizens," be explored. However, we explicitly left open the question of what weight should be accorded to that evidence in light of the evidence adduced under Issues 1 and 2. 33 FCC 2d at 512 n. 5. With respect to its efforts to meet the needs of its service area, AETC has taken numerous constructive steps to improve its performance by involving blacks in its programming processes and by taking other steps to serve the needs of the black community since the conclusion of the last license term and during the pendency of these proceedings. Its programming during the post-license term period has included several black-oriented series and a number of specials and news reports, largely locally-produced. A large number of programs concerning black culture, history and arts, as well as other programs specifically aimed at Alabama s black residents have been broadcast by AETC since its license term ended in 1970. It has also offered several black-oriented shows and programming involving a substantial number of blacks produced by the National Educational Television network. Additionally, AETC has reorganized its Citizens Advisory Committee which serves to make programming recommendations and it presently includes eight blacks among its 23 members. AETC has now adopted a previewing procedure to screen broadcasts and it employs two black assistants in this operation. It has also established a new production center at Alabama A&M, a predominantly black institution. Although AETC continues to delegate decisions concerning the content of instructional programming to the SDE, it has taken steps since the last license period to encourage the participation of black teachers in the in-school instructional programming and to involve the Alabama A&M production center in such programming. Finally, AETC conducted a survey in the summer of 1971 to ascertain the sentiment of Alabama's black residents

concerning the licensee's programming. The survey, which was conducted by black educational institutions, has been used in rescheduling certain network black-oriented programs to suit the preferences of black viewers revealed by the survey.

27. AETC's substantial post-term improvements are commendable and we have therefore given careful consideration to whether they justify favorable action on the applications now before us. We conclude that they do not: AETC's discriminatory programming practices and its failure adequately to serve the black residents of Alabama during the license term constitute such serious derelictions that we cannot decide the case on the basis of post-term improvements.

28. We have made clear in a number of cases that evidence of upgrading toward the end of, or after, the license period must be discounted and will be given little weight in a renewal proceeding where the applicant's performance during the license period was seriously deficient. *KORD, Inc.*, 31 FCC 85 (1961); *Evening Star Broadcasting Co.*, 27 FCC 2d 316 (1971), *affirmed sub nom. Stone v. FCC*, 466 F. 2d 316 (D.C. Cir. 1972); *RKO General, Inc.*, 35 FCC 2d 100 (1972); *Policy Statement Concerning Comparative Hearing Involving Regular Renewal Applicants*, 22 FCC 2d 424 (1970), *rev'd on other grounds sub nom. Citizens Communication Center v. FCC*, 447 F. 2d 1201 (1971). The limited potency of post-license term performance in a renewal proceeding was also emphasized by the Court of Appeals in *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994 (1966). The court said:

> ...although in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion. When performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant...must literally "run on his record." 359 F. 2d at 1007. 23/

23/ *See also Stone v. FCC, supra*, 466 F. 2d at 331.

29. This policy is rooted in the common sense proposition that enforcement of the public interest obligation of broadcasters cannot be meaningful if licensees are free to perform inadequately during their franchise period, secure in the knowledge that post-term efforts would guarantee renewal if a challenge should ever be mounted. Indeed, if we routinely allowed evidence of "upgrading" to save broadcast licenses that would otherwise not be renewed, we would expect to find potential competitors for the frequency hesitant to file a competing application because all would recognize that protracted litigation will give the licensee ample time to improve his performance.

30. Evidence of improved performance may in some circumstances be advanced by a renewal applicant as evidence of his willingness to correct deficient license term performance. 24/ However, as we noted in designating this issue for hearing, the weight to be accorded upgraded performance must necessarily depend on the seriousness of the deficiencies in the renewal applicant's license term performance. 33 FCC 2d at 512 n. 5. Having found, as we have here, serious misconduct involving discriminatory programming practices and an all but complete failure to serve the needs of Alabama's black residents, we cannot invoke that discretion on AETC's behalf. 25/

24/ The Court of Appeals in *United Church of Christ* specifically left to the Commission's discretion the opportunity "to experiment and even to take calculated risks on renewals where a licensee confesses the error of its ways..." 359 F. 2d at 1008 n. 28.

25/ AETC's reliance at oral argument on *Regents of the University of New Mexico (KNME-TV ED)*, 47 FCC 2d 406 (1974), for its contention that consideration of upgraded performance is appropriate in this case is misplaced. In refusing to designate for hearing the question whether the licensee had served the needs of Mexican-Americans and other minorities within its service area, we noted specifically that petitioners had failed to substantiate their allegations and that the licensee had, in fact, shown itself to be responsive to the problems, needs and interests of minorities. There was no finding of seriously deficient license term performance like that evident in the present case. Furthermore, we explicitly stated that although KNME-TV did not pose a case of belated upgrading, we would give little weight to belated improvement where a licensee failed to respond to significant community problems, "particularly if such improvement occurs after the station's license expiration date." 47 FCC 2d at 413.

Ultimate Conclusions and Disposition

31. AETC's conduct during its 1967-1970 license term falls far short of the high standard which we expect the licensee of a broadcast facility to maintain. The licensee followed a racially discriminatory policy in its overall programming practices (Issue 1) and, by reason of its pervasive neglect of a black minority consisting of approximately 30 percent of the population of Alabama, its programming did not adequately meet the needs of the public it was licensed to serve (Issue 2). While we recognize the vital function which educational television has come to serve, we cannot condone the derelictions and deficiencies reflected by this record merely because the licensee is a "public broadcaster." Nor can we accept post-term improvements after AETC realized its renewal applications were in jeopardy as out-weighing the shortcomings demonstrated during the license period. A history or disservice during the license term of the magnitude disclosed by the evidence of record in this proceeding makes it impossible for us to find that renewal would serve the public interest, convenience and necessity. AETC's renewal applications must accordingly be denied. We likewise find that a grant of AETC's application for a license to cover construction permit for Station WIIQ(ED-TV) at Demopolis, Alabama, would be inconsistent with the public interest and we conclude that it also must be denied. 26/

26/ We note that the application in Docket No. 19430 is for a license to cover a construction permit and, therefore, unlike the renewal applications, may not fall within the ambit of Section 309 of the Communications Act of 1934, as amended, which clearly places upon the applicant the burden of proving that a grant of the license would serve the public interest, convenience and necessity. See Sections 309(a)-(g) and 319(c) of the Act. Although this question is presently pending before the Commission in *Chesapeake-Portsmouth Broadcasting Corporation*, 47 FCC 2d 306 (1974), it is unnecessary to await its resolution. Even if we hold that the burden of proof is not upon the permittee, it would not affect our decision as to WIIQ(ED-TV). That station is an integral part of AETC's network and AETC's programs were simulcast over all its stations. Thus the unacceptable policies and practices which preclude a favorable public interest finding with respect to the licenses for renewal of the eight licensed stations also preclude a favorable public interest finding with respect to the application for license for WIIQ. The evidence of racially discriminatory programming practices and the failure adequately to serve the needs of the large black minority in Alabama is of sufficient power to require that AETC's license application be denied irrespective of which party had the burden of proof.

32. Normally, denial of renewal means that the licensee must cease operations and is further prohibited from filing a new application for a period of one year. In ordinary circumstances, that is the result that would follow here. But the circumstances here are not ordinary. This licensee is not an ordinary person. It is an agency of the State of Alabama and different considerations come into play in such circumstances. Cf. *Puerto Rico Telephone Co.*, FCC 74-784 (released July 19, 1974). Furthermore, the record reveals that since 1970 AETC has acted to correct the situation which existed during the license term. It has taken positive steps to insure black involvement in administrative and programming decision-making as well as in the production and presentation of programs, and to eliminate the discriminatory practices which previously had been followed. The improvements undertaken by AETC demonstrate that it has the capacity to change its ways and therefore that, despite its past misconduct, AETC possesses the requisite character qualifications to be a Commission licensee. Accordingly we hold that AETC is not ineligible to file applications anew for construction permits for the facilities, or any of them, under consideration here. 27/ Of course, applications may be filed by any interested persons and we expressly invite all such interested persons to do so. Applications for these facilities should be tendered by April 1, 1975. Because its renewal applications have been denied, AETC will not be entitled to any preference by reason of its prior status as a licensee. It must compete on an equal footing with any other applicants who may file for the frequencies. See *Lamar Life Broadcasting Co.*, 25 FCC 2d 101 (1970), 24 FCC 2d 618 (1970). In connection with any such applications, we will take particular note of whether and to what extent the composition of the AETC and its staff has changed since the license term.

33. In view of the extensive improvements effectuated by AETC and the pressing need for public television in Alabama, we find that the public interest will be well served by granting AETC interim authority to

27/ To this end, the provisions of Section 1.519 of our Rules governing the filing of repetitious applications will be waived.

continue operation of the eight stations for which it had held licenses and of the station for which it currently holds a construction permit, pending final Commission action on the new applications to be filed or until our further order. 28/ This procedure will avoid any interruption of valuable instructional and other educational services to the people of Alabama while the new applications are being processed.

34. ACCORDINGLY, IT IS ORDERED, That the above-captioned applications of the Alabama Educational Television Commission for renewal of licenses of Stations WAIQ, WBIQ, WCIQ, WDIQ, WEIQ, WFIQ, WGIQ, WHIQ and for a license to cover the construction permit for Station WIIQ ARE DENIED.

28/ This is in complete accord with the relief requested by petitioners herein, and is consistent with the *WLBT* case. *Office of Communication of the United Church of Christ v. FCC*, 425 F. 2d 543 (1969). In *WBLT* where similar serious misconduct precluded grant of the licensee's (Lamar Life) renewal applications, the Court of Appeals permitted the licensee to apply for the license and left open the possibility that it be allowed to carry on interim operations pending the completion of hearings on competing applications.

35. IT IS FURTHER ORDERED, That the Alabama Educational Television Commission IS AUTHORIZED to file applications for licenses for the above-captioned stations or for any of them; and that, on the Commission's own motion, Section 1.519 of the Rules IS WAIVED for this purpose.

36. IT IS FURTHER ORDERED, That the filing of competing applications for the above-captioned stations or for any of them IS INVITED; and that, in order to receive Commission consideration, a substantially complete application for each of the said stations SHALL BE TENDERED FOR FILING at the offices of the Commission in Washington, D.C. by the close of business on April 1, 1975.

37. IT IS FURTHER ORDERED, That the Alabama Educational Television Commission IS GRANTED interim authority to operate each of its stations pending final action on the new applications to be filed for said stations or until further order of the Commission.

38. IT IS FURTHER ORDERED, That these proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION *

Vincent J. Mullins
Secretary

*See attached Joint Dissenting Statement of Commissioners Robert E. Lee and Charlotte T. Reid.

APPENDIX

Rulings on Exceptions of Petitioners Eugene Farrell, Linda Edwards, Steven Smith and William D. Wright.

Exception No.	Ruling
1	Denied. The Commission may consider evidence of post license term improvements in certain circumstances. See *Office of Communication of the United Church of Christ v. FCC, 359 F2d 994* (1966).
2	Denied. The Judge's ruling is correct. See ruling on exception 37.
3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18	Denied. The challenged rulings are not of decisional significance.
17	Granted. The racial composition of the Alabama Educational Television Commission is relevant to the issue of discrimination in the licensee's overall programming practices.
19, 20, 21, 22, 24, 27, 28, 29, 32	Denied. The findings to which exceptions are taken and the additional requested findings are not of decisional significance in light of our findings concerning AETC's responsibility for the actions of those to whom it delegated programming responsibilities. See Decision and ruling on exception 33.
23, 33, 86, 87	Granted in substance. AETC as licensee had the power to revoke all delegations of authority and was ultimately responsible for the discriminatory actions of the delegatees who produced the programming broadcast on its frequencies. See Decision and 33 FCC 2d at 508.
25, 26	Granted. The testimony of Mr. Stork indicates that the Montgomery production center was uniquely under the control of AETC.
30, 31, 129	Granted. The record warrants the conclusion that AETC chose to delegate certain programming authority to the SDE.

Exception No.	Ruling
34	Granted in part and denied in part. Applicable precedent and the designated issue on discriminatory programming practices do not limit the inquiry to a question of the existence of a formal policy of discrimination. To the extent that the ALJ's finding reflects a misconception in the Initial Decision on this point, the exception is granted. In all respects it is denied as without decisional significance.
35, 36, 48	Granted. The ALJ erroneously concentrated his analysis of the evidence under Issue 1 on the amount of integrated programming broadcast on AETC, while the issue was directed at the "overall programming practices" of AETC. Moreover, the question of discrimination in programming was incorrectly characterized as involving the amount of programming directed specifically toward black audiences.
37, 58, 61, 63	Granted in part and denied in part. The Judge erroneously gave undue weight to the evidence of integrated programming contained in AETC Exhibit 1 which represented virtually all integrated programming made available to it by the production centers. This programming is insufficient to overcome the evidence of the sample weeks which were stipulated to be random examples of typical AETC programming. In all other respects the requested findings are denied as without decisional significance.
38	Granted. The record reveals that only one-half hour of integrated programming was actually broadcast during the week of November 10-16, 1968.
39, 65	Granted in substance. Even if the NET affiliation contract were ambiguous, AETC could readily have ascertained whether offending material could be deleted from a program.

Exception No.	Ruling
40, 42, 46, 47, 88, 90	Granted. The evidence suggests that the decisions to preempt NET programming were based in part on impermissible racially discriminatory grounds. See discussion of NET programming in the Decision.
41	Granted. The statements suggest that the ALJ erroneously placed the burden of proof on petitioners rather than on AETC. See 33 FCC 2d at 514.
43, 94, 95	Denied. The findings are not of decisional significance.
44, 45, 49, 51	Granted in substance. To the extent indicated in the discussion of discriminatory programming in the Decision, the objections to the findings are sustained and the requested findings are granted.
50	Denied. The testimony was entitled to consideration even though it was outweighed by other evidence.
52, 53, 54, 55, 56, 57, 60, 62, 64(f), 66(c)-(d), 68, 69, 72, 73, 76, 80, 81, 91	Denied. The findings are not of decisional significance in light of our Decision in this proceeding.
59, 64(a)-(e), 66(a)-(b), 67, 71	Granted. The requested findings accurately reflect the record and are of decisional significance.
70(a)-(d), (f)	Granted. The requested finding is an accurate summary of the evidence contained in the testimony of the general manager and the memoranda from the production coordinators and is of decisional significance.
70(e)	Denied. The requested finding is incomplete and would present only a partial picture of the reasons why "Dick Gregory is Alive and Well" was not broadcast.
74, 75, 89	Granted in part and denied in part. See discussion of burden of proof in the Decision and the resolution of each of designated issues in the Decision.

Exception No.	Ruling
77, 78, 79, 85, 92, 102, 103, 107	Denied. Our Decision more accurately reflects the evicence of record.
82, 83, 84	Denied. The requested conclusions are not of decisional significance for the reasons contained in the discussion of discriminatory programming.
93, 104	Denied. The exceptions do not comply with Section 1.277(a) of the Rules.
96	Granted in substance for the reasons contained in the Decision.
97	Petitioners have not filed any exception 97.
98	Granted. The requested finding accurately reflects the record and is of decisional significance.
99, 100, 110, 111, 113	Granted in part and denied in part. To the extent indicated in the Decision, the exceptions are granted but in all other respects, they are redundant and denied as without decisional significance in view of our Decision.
101	Denied. The record evidence is insufficient to support the requested finding.
105, 106, 108, 109	Granted. The requested findirgs accurately reflect the record and are of decisional significance.
112, 118	Denied. The requested findings are not of decisional significance in light of our Decision.
114	Petitioners have filed no exception 114.
115	Denied. There is no merit to petitioners' contention that the exhibit is without foundation. See, however, our rulings on exceptions 37, 58, 61 and 63, supra.

Exception No.	Ruling
116	Denied. Petitioners' exception violates Section 1.277(a) of the Rules in that they are argumentative and unsupported by record citations.
117	Granted. AETC's professed ignorance of its responsibilities as a licensee cannot excuse its inept performance and failure to serve Alabama's black community.
119, 121, 124, 125	Denied. The ALJ's findings adequately and correctly reflect the record evidence.
120, 122, 123, 124A, 156	Denied. The exceptions relate to findings which are not of evidentiary significance in light of our Decision in this proceeding.
126, 147	Denied. The extent to which post-term improvements may be considered is set forth in the Decision.
127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 140, 143, 144, 146, 148, 149, 150, 152	Denied. The ALJ's findings adequately and correctly reflect the relevant and material evidence of record. Further, petitioners' objections to findings and requested findings are not of decisional significance and the ALJ is not required to make findings on every conceivable point on which evidence is offered.
139, 145, 151, 153	Denied. The requested findings are not of decisional significance in light of our Decision in this case.
141, 142	Granted in substance. The requested findings are relevant and supported by record evidence.
153a	Denied in substance. See discussion of Section 73.680 of the Rules in the Decision.
154, 155	Denied. We agree with the Judge's findings and conclusions which are supported by the evidence of record.
157	Granted. The requested finding accurately reflects the record evidence.

Exception No.	Ruling
158, 159, 160, 161, 162, 163	Denied. The requested findings are not of decisional significance in light of our Decision.
164, 165	Denied. The ALJ correctly applied the burden of proof with respect to issue 4.
166, 167, 171, 172, 173, 174, 175, 176, 179, 182	Denied. The ALJ's findings and conclusions correctly reflect the record evidence and are consistent with applicable law.
168, 169, 170, 177	Denied. The requested findings are not of decisional significance in light of our Decision on this issue.
178	Denied. The requested finding is speculative and not supported by record evidence.
180, 181, 183, 184, 185	Granted in substance. AETC has not met its burden of demonstrating that renewal of its licenses would serve the public interest and we conclude that the applications must be denied, AETC being allowed to file new applications and continue operations as provided for in the Decision.

Rulings on Limited Exceptions Filed by the Alabama Educational Television Commission.

Exception No.	Ruling
1	Denied. The cited programming was considered by the Commission, but was outweighed by the other evidence concerning AETC's failure to serve Alabama's black citizens. Furthermore, AETC has offered no evidence of how its programming was serving the needs of Alabama's black citizens.
2	Denied. The ALJ's conclusion correctly reflects the weight of the evidence.
3	Denied. Although licensees are not required to provide separate programming designed specifically for minorities, it is clear that they may not ignore the needs and interests of significant minorities in their service area. *Capitol Broadcasting, Inc.*, 38 FCC 1135 (1965), *Time-Life Broadcast, Inc.*, 33 FCC 2d 1081 (1972). Furthermore, AETC's overall programming cannot offset the serious deficiencies established by the evidence.
4, 5	Denied. The sample weeks were stipulated to be random examples of AETC's typical weekly programming and AETC provided information concerning the extent to which each program was integrated. And although it had the burden of proof on each designated issue, AETC did not come forward with evidence that it broadcast a significant amount of additional integrated programming. Furthermore, integrated programming as reflected in the sample weeks was only one factor considered by the Commission in determining whether AETC had discriminated in its programming practices and whether it had served the needs of Alabama's black citizens.
6	Denied. AETC raised no objection at the hearing to the question concerning the programs, and Mr. Hurlbert, the general manager of AETC, testified that he recalled the program and that it was not

Exception No.	Ruling
6 (continued)	carried by AETC. (Tr. 951). In addition, if further information regarding these programs was pertinent, it was incumbent upon AETC to come forward with such evidence.

JOINT DISSENTING STATEMENT OF
COMMISSIONER ROBERT E. LEE AND
COMMISSIONER CHARLOTTE T. REID

RE: Alabama Educational Network (AETC)

Today a new chapter is written in the history of the Federal Communications Commission, one which we do not believe to be either reasonable or in the public interest. A chapter which represents to us, at least, an attempt to punish, in the harshest way possible, under our Rules, the Alabama Educational Television Commission, licensees of eight operational Educational TV Stations and permittee of a Construction Permit for one new Educational TV facility.

SEPARATE VIEWS OF COMMISSIONER ROBERT E. LEE

We are all aware of the long struggle for the attainment of Civil Rights in this country. At the outset, I would like to say I have always been a supporter of full Civil Rights for all U.S. citizens; particularly since I am a member of a minority and was the son of poor immigrant parents My support of Civil Rights dates back to a point in time before it was fashionable to take this position.

When I first came to the Commission in 1953, I took a very active position in promoting educational broadcasting, which was far from being a reality. I had many conversations with Alabama Educational officers, including the then Governor Persons. These officials took a leading role in developing educational TV in Alabama and were ultimately the first interconnected statewide TV network. As a matter of fact, in my efforts to promote educational TV, I used Alabama as an example when I encouraged other states such as New York to emulate their success.

We are now faced with a situation wherein the majority of the Commission may destroy the educational TV system in Alabama because of past dereliction in the area of Civil Rights. I certainly do not excuse such derelictions, but it seems to me that the time for punishments, or even revenge, is long past; particularly when the record reflects that these wrongs have long since been corrected.

I would also point out that the Alabama Educational Television Network (AETN) is not a private enterprise and as such there is no profit motivation. The investment in this educational system is all from public funds. Normally in our daily activities, we punish commercial broadcasting by taking away their source of profit. This is not the case in Educational TV, therefore it appears to me that we are beating the back of the public for a principle I simply cannot discern nor support.

SEPARATE VIEWS OF COMMISSIONER CHARLOTTE T. REID

The majority, by a 4 to 2 vote, has concluded that the AETC, is not fit to be a licensee of this Commission. Then, without further clarification or justification, they find that they (AETC) should be allowed to continue to operate the facilities in the interim period and to file, as a new applicant, an application to be granted licenses to operate these same facilities. It should be noted here that I do not object to the operation of the stations by AETC in the interim, but I simply believe it is totally illogical to find that AETC is unfit to be a licensee and then to turn around and have them operate the facilities in the interim and to invite them to file as new applicants for these same facilities.

A more prudent course, in my judgment, would have been to grant a short term renewal of the licenses, but the majority, for reasons best known to themselves, failed to take this action.

There is not one Commissioner, including this one, who condones what went on at the Stations during the license term, 1966 to 1969. But the Commission noted in the designation order that certain problems had been brought to light and specifically provided in the order that:

> "3. To determine the extent of efforts being undertaken by the Alabama Educational Television Commission to develop programming to serve the needs of Alabama's citizens.
>
> 4. To determine whether the Alabama Educational Television Commission has made reasonable and good faith efforts to assure equal opportunities in its employment policies and practices in accordance with Section 73.680 of the Commission's Rules."

As will be noted, only one of the four Commissioners in the majority today, was a member of the Commission at that time. The Commission felt that this was an exceptional case, one which warranted further consideration. The record before this Commission adequately reflects substantial compliance by the AETC of the Commission's Rules. Certainly hindsight is much better than foresight on the part of the AETC, but they did respond to the problems. To punish them in the fashion done here by the majority does not in my mind appear to be in the public interest. Are we really punishing AETC or all the citizens of Alabama?

I join with Commissioner Lee in his fear that this decision may well destroy the educational TV system in Alabama. A system which all citizens of that state deserve and need. To use this system as a whipping boy will not serve in the best interest of anyone.

For these reasons, I join with Commissioner Lee in this dissent, I only wish it could have been the majority's decision.